No. 7769

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United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW MISSION MARKET, a Corporation,
Appellant.

vs.

UNITED DRUG COMPANY, a Delaware Corporation,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

YOUNG, HUDSON AND RABINOWITZ, Esqrs.,
605 Market St., San Francisco, Calif.

OSCAR SAMUELS, Esq.,
333 Montgomery St., San Francisco, Calif.

Attorneys for Plaintiff and Appellant.

CHICKERING & GREGORY, Esqrs.,
Merchants Exchange Bldg., San Francisco,
Calif.

Attorneys for Defendants and Appellees.

In the Southern Division of the District Court of the United States for the Northern District of California.

No. 19,632-L

NEW MISSION MARKET, a corporation,

Plaintiff,

vs.

UNITED DRUG COMPANY, a Massachusetts corporation, and UNITED DRUG COMPANY, a Delaware corporation,

Defendants.

COMPLAINT UPON GUARANTY AND ASSUMPTION OF LIABILITY THEREUNDER

Comes now the plaintiff above named and complains of the defendants and for cause of action alleges:

I.

The ground upon which the jurisdiction of this Court depends is diversity of citizenship between the parties hereto.

II.

The plaintiff NEW MISSION MARKET now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City and County of San Francisco, in said State, and is a citizen of the State of California and a resident of the City and

County of San Francisco, in the Southern Division of the Northern District of California.

III.

The defendant first above named, UNITED DRUG COMPANY, now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal place of business located in Boston, in said Commonwealth, and is a citizen of said Commonwealth, [1]* which corporation will hereafter be designated "Massachusetts Corporation."

IV.

The defendant second above named, UNITED DRUG COMPANY, now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located in Boston, in the Commonwealth of Massachusetts, and is a citizen of the State of Delaware, which corporation will hereafter be designated "Delaware Corporation."

V.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

* Page numbering appearing at the foot of page of original certified Transcript of Record.

VI.

That O'BRIEN-KIERNAN INVESTMENT CO. now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California.

VII.

That LOUIS K. LIGGETT COMPANY now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

VIII.

That on February 27, 1926, O'BRIEN-KIERNAN INVESTMENT CO., a corporation, WILLIAM H. WOODFIELD, JR., and SAMUEL WEINSTEIN, as lessors, and LOUIS K. LIGGETT COMPANY, as lessee, made, executed and delivered each to the other, a certain written indenture of lease of the premises situate in the City and County of San Francisco, State of California, described as follows:

> The corner store and basement premises in that certain building, situate on the northwest corner of Mission and 22nd Streets, which corner store and basement have a frontage on Mission Street of 41 feet and a frontage on 22nd Street of 100 feet measured from the point of intersection of the westerly line of Mission Street with the northerly line of 22nd Street, said store being of uniform depth and width. [2]

a copy of which lease is attached hereto, marked Exhibit "A" and made a part hereof as if herein at length fully set forth, for the term of 20 years commencing June 5, 1927, or any date prior thereto upon which said lessors should tender possession of the premises to the lessee by written notice 60 days prior thereto, upon a minimum fixed rental which said lessee agreed to pay said lessors, in advance, on the first day of each month, as follows, to wit: $2,750.00 for each month for the first 5 years of said lease term; $3,000.00 for each month for the second five years of said lease term; $3,250.00 for each month for the third 5 years of said lease term; and $3,500.00 for each month for the fourth 5 years of said lease term; that in addition to the payment of the foregoing minimum rentals, said lease provided for the payment by said lessee to said lessors of an amount calculated upon a percentage of the gross receipts resulting from the operation of lessee's business in a portion of said premises; that plaintiff is informed and believes and therefore alleges on information and belief that the receipts of said business so operated by said lessee at no time reached an amount sufficient to require a payment in addition to said minimum rentals and plaintiff is therefore not seeking any recovery based upon such percentage of gross receipts in this action; that on the 5th day of June, 1927, said lessee entered into possession of said premises under said lease and said last-mentioned date was recognized and agreed to by said lessors and said lessee as and was the date of commencement of the term of said lease.

IX.

That concurrently with the execution of said lease and as part of the same transaction and in consideration thereof, Massachusetts Corporation made, executed and delivered to said lessors in writing its guaranty of the payment of the rental and performance of the terms, covenants and conditions of said lease by said lessee, in the words and figures as follows, to wit: [3]

> In consideration of the foregoing lease and One ($1.00) Dollar to the undersigned in hand paid by the lessors therein named, receipt of which is hereby acknowledged, United Drug Co., a corporation, does hereby covenant, promise and agree to and with said O'Brien-Kiernan Investment Company, William H. Woodfield, Jr. and Samuel Weinstein that the said Louis K. Liggett Company, lessee, shall well and truly pay all rents and perform and execute all the covenants and agreements therein contained on its part, and on its failure to do so in any particular the undersigned will forthwith pay unto said lessors, without any previous demand, all rents accrued and all damages incurred by reason of said failure, including reasonable attorney's fees.
>
> IN WITNESS WHEREOF, the undersigned corporation has caused its corporate name and seal to be hereunto affixed this 27th day of

February, 1926 by its officers thereunto duly authorized.

United Drug Co.

By Charles McCallum,
Vice-President

By.....

X.

That on or about the first day of February, 1928, the Delaware Corporation, for valuable consideration, assumed and expressly agreed to perform all the obligations of the Massachusetts Corporation, including the obligations provided for in said guaranty.

XI.

That on or about the 31st day of March, 1933, LOUIS K. LIGGETT COMPANY filed its voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, and on the 31st day of March, 1933, was duly adjudicated a bankrupt, and on the 15th day of April, 1933, Chandler Hovey, Roy A. Heymann and Thomas H. McInnerney were duly appointed Trustees in Bankruptcy of said LOUIS K. LIGGETT COMPANY, directly thereafter qualified as such, and ever since have been and now are the duly qualified and acting Trustees of the estate of said bankrupt.

XII.

That thereafter and on or about the first day of October, 1933, the plaintiff, by mesne assignments,

succeeded to the interest [4] and estate of the lessors in said lease and became entitled to all rentals called for thereby, both accrued and unpaid and to accrue, and to all benefits and privileges conferred by, arising out of and incident to said interest and estate inuring to the lessors therein, including said guaranty, and became entitled to the moneys, benefits and privileges due and to become due under said guaranty. That ever since said last-mentioned date the plaintiff has been and now is the owner of and the successor in interest to said interest and estate of said lessors and likewise has been and now is the successor in interest to the obligees named in said guaranty. That on or about the 5th day of October, 1933, written notice of the aforesaid succession of this plaintiff to the interest of said lessors in said lease and of its succession to the interests of the obligees in guaranty was given by the plaintiff to the lessee in said lease, to the Trustees in Bankruptcy of said lessee, and to each of the defendants herein.

XIII.

That pursuant to the terms of said lease there became due and payable, as rental for the premises demised thereby, the sum of $3,000.00 per month on the first day of each and every month commencing with March, 1933, and to and including October, 1933, or the total sum of $24,000.00. That on or about the 26th day of January, 1934, plaintiff served upon the lessee in the aforementioned lease at No. 41 East 42nd Street, New York, which is the place designated

in said lease for the service of such notice, upon the Trustees in Bankruptcy of said lessee, and upon the defendants herein, a notice in writing of the default in the payment of the rental reserved in said lease and of the fact that the plaintiff herein intended to rely upon said default as the basis for an action to be filed against defendants herein. That more than 15 days have elapsed since the service of said notice, and the lessee in the aforementioned lease, the Trustees in Bankruptcy of said lessee, and the [5] defendants herein, and each of them, have refused and failed to pay the sum of $24,000.00, or any part thereof, and that said sum of $24,000.00 is wholly unpaid.

XIV.

That a reasonable attorneys' fee for the institution and prosecution of this action is the sum of $5,000.00.

WHEREFORE, plaintiff prays judgment against said defendants, and each of said defendants, in the sum of $24,000.00, with interest thereon, for the sum of $5,000.00 attorneys' fees, for costs of suit herein incurred, and for such other and further relief as may be meet and proper in the premises.

YOUNG, HUDSON & RABINOWITZ
OSCAR SAMUELS
Attorneys for Plaintiff, 605 Market Street, San Francisco, California. [6]

State of California,
City and County of San Francisco—ss.

WILLIAM H. WOODFIELD, JR., being first duly sworn, deposes and says:

That he is an officer, to wit, Secretary, of NEW MISSION MARKET, a corporation, the plaintiff named in the foregoing Complaint, and makes this verification for and on its behalf; that he has read said Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that as to those matters he believes it to be true.

WILLIAM H. WOODFIELD, JR.

Subscribed and sworn to before me this 28th day of February, 1934.

[Seal] JENNIE DAGGETT

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Feb. 29, 1936 [7]

EXHIBIT "A"

THIS INDENTURE, made and entered into this 27th day February, 1926, by and between O'BRIEN-KIERNAN INVESTMENT CO., a corporation duly organized and existing under and by virtue of the laws of the State of California, and WILLIAM H. WOODFIELD, JR., and SAMUEL WEINSTEIN, hereinafter called the lessors, and LOUIS K. LIG-

GETT COMPANY, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and authorized to do and doing business in the State of California under and by virtue of the laws of the State of California, hereinafter called the lessee,

Witnesseth:

That the lessors, in consideration of the rents, covenants and agreements hereinafter contained, to be paid, kept and performed by the lessee, and upon the condition that each and all of the said covenants and agreements shall be fully kept and performed by the lessee, does by these presents lease, demise and let unto the lessee, for the purpose of conducting herein any lawful business, those certain premises situated in the City and County of San Francisco, State of California, and more particularly described as follows, to-wit:

The corner store and basement premises in that certain building situate on the northwest corner of Mission and Twenty-second Streets, which said corner store and basement premises have a frontage on Mission Street of forty-one (41) feet by one hundred (100) feet on Twenty-second Street, measured from the point of intersection of the west line of Mission Street with the northerly line of Twenty-second Street and extending to the centers of the bounding partitions, and are of uniform width and depth throughout. [8]

TO HAVE AND TO HOLD the said premises,

with the appurtenances, unto the lessee, for the term of twenty (20) years, commencing on the fifth day of June, 1927, or any date prior thereto upon which the lessor shall tender possession to the lessee by giving to lessee written notice, at least, sixty (60) days prior thereto, at the following rental, payable in gold coin of the United States of the present standard of weight and fineness, as follows, to-wit: Twenty-seven Hundred Fifty ($2750.00) Dollars for each month of the first five (5) years of the lease term, Three Thousand ($3000.00) Dollars for each month of the second five (5) years of the lease term, Thirty-two Hundred Fifty ($3250.00) Dollars for each month of the third five (5) years of the lease term and Thirty-five Hundred ($3500.00) Dollars for each month of the fourth five (5) years of the lease term. The above rentals provided for are fixed minimum rentals payable monthly in advance on the first day of each and every calendar month of the lease term in the amounts specified. In addition the *lease* shall pay to the lessor within thirty days next succeeding the close of each calendar year of the lease term, and on account of the rental of the demised premises for the year immediately passed, a sum of money in like gold coin which shall be computed upon the basis of the volume of the business transacted by lessee in the portion of the demised premises used by it for its own business during the said last passed year as follows, to-wit: The lessee shall charge itself for the annual rent of that portion of the demised premises actually occupied by it in the transaction of its busi-

ness a sum that shall be the net difference between the sum of the annual minimum rental for that year as provided in this lease, plus its hereinafter designated pro rata of increase in taxes, and subtracted amount of its income (or rental value if vacant) during that calendar year from its subtenants in the portion [9] of the herein demised premises not actually occupied by itself. It being understood that lessee shall not at any time rent or lease any part of said demised premises not to be occupied by it at a rental less than the approximate prevailing rental at the time of such renting or leasing. This computation shall fix the amount of the charge the lessee shall make against itself and its business in the premises occupied by it for the purposes of the computations of this lease. In the event that any portion of the demised premises not occupied by the lessee is vacant during any time the rental of said portion shall be taken into consideration instead of the rent thereof for such time.

Whenever in any year eight (8) per cent of the gross volume of business transacted by lessee in that portion of the demised premises occupied by it for its own business shall exceed the yearly rent that it shall charge itself, as above provided, for that year for said premises, then the lessee shall pay to the lessor in addition to the minimum rent provided for that year a sum of money equal to the amount by which eight (8) per cent of its said gross volume of business in said premises during that year shall exceed the said rental charge against itself for rent of said premises.

The proportion of the taxes upon the whole property in which the demised premises are situated that shall be payable by lessee to lessor during any year of the lease term shall be determined as follows, to-wit: The taxes upon said whole property for the fiscal year 1925-26 shall be taken as the basis of computation and shall be subtracted from the taxes upon the same property for the particular fiscal year during which computation is being made; and the lessee shall pay to the lessor that proportionate part of the said subtracted difference which the rental value of the premises herein demised during the then last past calendar year bears to the [10] rental value of the whole building in which said premises are situated during said year. In determining such rental value no deduction shall be made because of vacancy in any part of said building. When any portion of said building is rented, the rental thereof shall be conclusively considered to be the "rental value" for the purposes of this calculation.

In the event that the lessor and lessee cannot agree between themselves upon the rental value for any one year, then, upon the demand of either, they shall submit the question of such rental value to two competent and disinterested appraisers, who shall be reputable men, who have been engaged in the real estate business in San Francisco for, at least, three years previous, one of whom shall be selected by the lessor and one by the lessee, and in case these two cannot agree, they shall select an umpire. The decision of any two of the three shall be final and con-

clusive. The appraisal shall be in writing, and a copy thereof shall be given to the lessor and the lessee, and the finding of rental value then shall be the basis of the computation upon which shall be apportioned the payment of taxes for that year as hereinafter provided. The lessor and the lessee shall bear the cost of said arbitration equally between them.

And the lessee does hereby hire and take of and from the lessor the said premises, for the said term and at the said rental, and does hereby covenant and agree with the lessor as follows;

1. That the lessee will pay the said rent reserved to the lessor at the office of the lessor, or at such other place or places as may be designated from time to time by the lessor, at the times and in the manner provided as aforesaid for the payment thereof, without deduction, default or delay, and that in the event of the failure of the lessee so to do, or in the event of a breach of any [11] of the other covenants herein contained on the part of the lessee to be kept and performed, it shall be lawful for the lessors to re-enter into and upon the said premises, and every part thereof, and to remove all persons and property therefrom, and to repossess and enjoy the said premises as in the first and former estate of the lessors, anything to the contrary herein contained notwithstanding.

Provided, however, anything to the contrary herein contained notwithstanding, the lessors agree that they will not begin action for the recovery of any rent, or any other moneys due hereunder, or any

action based upon the failure on the part of the lessee to perform any of the terms, covenants or conditions hereof, unless and until the lessor sends a letter by prepaid, registered mail to lessee's New York office at Number 41 East Forty-second Street or such other place that lessee may in writing designate expressly advising the lessee of any default upon which the lessor intends to rely for any contemplated action against lessee, and the lessee shall have fifteen (15) days after mailing of such letter within which to make good the default of which complaint has been made by the lessor; provided, however, interest at the rate of six per cent (6%) per annum shall be paid and added to any amount of rent so in default for the time that the payment of said rent has been delayed.

If the lessee shall be in default in the performance of any condition or covenant herein contained, and shall abandon or vacate said premises, besides other remedies or rights the lessors may have, it shall be optional with the lessor to re-let the said premises for such rent and upon such terms as the lessor may see fit it being understood that lessors shall not rent or lease any part of the demised premises at a rental less than the approximate prevailing rental at the time of such rental or leasing, and if a sufficient sum shall not be thus realized after paying the expenses of such reletting and collecting to satisfy the rent hereby reserved, the lessee agrees to [12] satisfy and pay any deficiency, and to pay the expenses of such reletting and collecting.

2. That the lessee at all times during the life of this lease shall itself or any such subsidiary or such associate of the lessee as hereinafter described engaged in the same line of general drug business as lessee shall occupy for the purpose of conducting its own mercantile business the store at the corner of the demised property and which store shall not at any time have less than twenty-five (25) feet frontage upon Mission Street and sixty (60) feet frontage on Twenty-second Street, measurements to be computed in the same manner as the dimensions of the herein demised premises. And the lessee will not use or permit to be used the said corner store premises, or any part thereof, for any purpose or purposes other than for the purpose of conducting therein its own retail mercantile business or that of any such subsidiary or such associate of the lessee as hereinafter described engaged in the same line of general drug business as lessee and no use shall be made of said demised premises, nor acts done, which will increase the existing rate of insurance upon the building in which the demised premises are situate, unless said lessee shall pay the lessor the amount of such increase in cost of such insurance, nor shall the lessee sell, or permit to be kept, used or sold, in or about the said premises, any article which may be prohibited by the standard form of fire insurance policies.

3. That the lessee will not commit, or suffer to be committed, any waste upon the said premises; that the lessee shall be privileged to make such

alterations or changes in the herein demised premises (not changing or affecting or modifying any structural part thereof) as shall be necessary to conduct its own business, or that of any such subsidiary or such associate of lessee as aforesaid, or the business of its subtenants, and that any additions to or alter-
[13] ations of the said premises, except movable furniture and trade fixtures, shall become at once a part of the realty and belong to the lessor; that at the termination of the lease term, by expiration of time, or otherwise, the lessee shall surrender the property to the lessor in whatever condition the premises are at the expiration of the lease, and the lessee shall not be required, at the expiration of the lease, to replace the property in the condition it was at the time the lessee received possession.

4. The lessee may assign this lease as a whole to any subsidiary or associate of the lessee in the same line of general drug business as lessee and which subsidiary or associate shall acquire a substantial part of the assets of the lessee and all the drug stores operated, owned and/or controlled by lessee in San Francisco or San Francisco and elsewhere and whose gross annual business shall amount to at least Five Million ($5,000,000.00) Dollars per year; and lessee may sublet any part of the demised premises to any other person for any lawful business, provided that the corner portion, twenty-five (25) feet on Mission Street by eighty (80) feet on Twenty-second Street to be occupied by lessee for its own business shall not be underlet except to such associate

or subsidiary as aforesaid. The lessee shall at all times, even after any assignment, be and remain directly liable to pay the rent and other payments, and perform all the other covenants and conditions herein provided, it being understood that no assignment shall be made unless the assignee shall also assume full responsibility for the payment of the rent and other payments in this lease provided, and for the performance of all the covenants and conditions hereof. In the event, however, that the lessee shall be adjudicated a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and said lessors shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset [14] of the lessee after adjudication of bankruptcy, and if the lessee shall become insolvent or fail in business, or if a receiver shall be appointed to take charge of the business of lessee, or receive the rents of the demised premises, or if assignment be made for the benefit of creditors, then this lease may be terminated at once at the option of the lessors expressed in writing, in which event the lessors shall have the right immediately to reenter the demised premises, and in no event shall this lease be treated as an asset of the lessee after the exercise of said option.

5. That the lessee will, at its sole cost and expense, keep and maintain the interior of the demised premises, including plumbing (exclusive of such plumbing as is not devoted exclusively to lessee's premises) and the store fronts, also any exterior

walls that may have been altered by lessee, also such portions of the sidewalks including sidewalk lights and sidewalk doors in front of said demised premises as are above any sub-sidewalk space in good order and repair and in tenantable condition, injury thereof or destruction thereof by fire or the act of God excepted, during the full term hereof. And the lessee hereby waives all right to make repairs at the expense of the lessors as provided in Section 1942 of the Civil Code of the State of California as to any of the parts of the demised premises hereinabove in this paragraph agreed to be kept and repaired by the lessee.

6. That the lessee will, at its sole cost and expense, comply with all of the requirements pertaining to the demised premises including the business to be carried on by the lessee in the said premises, of all Municipal, State and Federal authorities now in force, and will faithfully observe in the use of the premises all Municipal ordinances and State and Federal Statutes now in force or which may hereafter be in force, a failure so to do, and the commencement or pendency in any State or Federal court of any abatement proceedings affecting the use of the lessors, be deemed to be a breach of this lease. [15]

7. That the lessee will pay for all water, heat, light and power and other utility supplied to the said premises.

8. That the lessee, as a material part of the consideration to be rendered to the lessor under this

lease, will, and does hereby, assume all risk of damage to goods, wares and merchandise in and upon the said demised premises from every source, and for the injuries to persons in or about the said demised premises from any cause, except where such injuries or damage result from negligence or omissions of the lessors and that the lessee will hold the lessors exempt and harmless for or on account of any such damage or injury, including any such damage or injury upon any portion of the sidewalks abutting upon said demised premises and which the lessee is obliged to keep and maintain and also upon any portion of the sidewalks including sidewalk lights and sidewalk doors abutting upon such demised premises where the damage or injury results from the negligence of lessee.

9. That the lessee will not place, or permit to be placed in, upon or about the said premises any unusual or extraordinary signs, and will not conduct, or permit to be conducted, any sale by auction on the said premises. And it is hereby mutually covenanted and agreed that the lessors have reserved the exclusive right to the roof of the said premises.

10. That the lessee will permit the lessors and their agents to enter into and upon said premises at all reasonable times for the purpose of inspecting the same and for the purpose of maintaining the building in which the said premises are situate, or for the purpose of making repairs, alterations and additions to any portion of said building, including the replacing or reinforcing of any and all walls,

columns and girders, without any rebate of rent to the lessee for any loss of occupancy or quiet enjoyment of the premises thereby occasioned; and will permit the lessors at any time [16] after thirty (30) days prior to the expiration of this lease to place upon said premises any usual or ordinary "To Let" or "To Lease" signs.

11. The lessee agrees in the event the lessor brings an action or actions at law against the lessee to enforce the payment of any rent due, or to enforce any of the terms or conditions of this lease, or commence a summary action under the Unlawful Detainer Act of the State of California for the forfeiture of this lease, and possession of the demised premises, and prevail therein, to pay to lessor all attorney's fees and cost in said action or actions, such attorney's fees to be such as may be fixed by the court in such action; provided, however, if the lessor shall not prevail therein the lessee shall be paid like reasonable attorneys' fee incurred in and about the defense of any such action.

12. That if the lessor, for any reason whatsoever, can not deliver possession of the said premises to the lessee at the commencement of the said term, as hereinbefore specified, this lease shall not be void or voidable, nor shall the lessor be liable to the lessee for any loss or damage resulting therefrom; but in that event there shall be a proportionate deduction of rent covering the period between the commencement of the said term and the time when the lessee can deliver possession; provided, however, if possession of the

demised premises for any reason shall not be delivered to the lessee within the period of nine (9) months from and after said fifth day of June, 1927, then at the option of the lessee this lease may be terminated and all parties will be released from all liability hereunder.

13. That in the event of a destruction in whole or in part of the demised premises from and after the date hereof and/or during the term hereof, from any cause, the lessor at their sole cost and expense shall either cause the same to be repaired and restored or they will construct a new building without unnecessary delay, and allot to lessee the same space in said new building as is leased [17] hereunder, and upon the same rental, and the same terms as herein-provided for; it being understood, however, that in case of partial destruction and repair the demised premises shall be repaired and returned to the lessee within sixty (60) working days, and, in the event of a new building being constructed, one hundred and twenty (120) working days; time lost by strikes, lockouts, delays occasioned by injunction proceedings or other causes beyond lessor's control shall be added to the above provided time. During the time that the lessee shall be wholly or partially out of possession of the demised premises by reason of the rebuilding or repair thereof, the rental and other moneys called for by the terms of the lease shall be abated or adjusted until the lessee again resumes, or is tendered, actual possession of all of its herein demised space.

14. The waiver by the lessor of any breach of any terms, covenants or conditions herein contained shall not be deemed to be a waiver of any subsequent breach of the same or any other terms, covenants or conditions herein contained.

15. The lessor does hereby covenant and agree with the lessee that the lessee, keeping and performing the covenants and agreements herein contained on the part of the lessee to be kept and performed, shall at all times during the said term peaceably and quietly have, hold and enjoy the said premises, without suit, trouble or hindrance from the lessor.

16. Any holding over after the expiration of the said term, with the consent of the lessors, shall be constructed to be a tenancy from month to mo*m*th, and shall otherwise be on the terms and conditions herein specified, so far as applicable.

17. The lessee hereby agrees at its own cost and expense to deliver to the lessors within thirty (30) days next succeeding the close of each calendar year of the lease term, a complete statement of the gross volume of business transacted by it or its said subsid- [18] iary or associate aforesaid, in that portion of the demised premises occupied by it for its own business, during such year; as also that of any store promoted, established or maintained by it or its subsidiary or associate, or in which either may become interested, within the prescribed distance hereinafter referred to; which said statement shall also contain a memorandum of all figures involved in the computation of any of the additional rentals to be paid

by the lessee hereunder. The lessee further agrees that the books of lessee that apply to its own business conducted in that portion of the demised premises actually occupied by it as herein provided including those of such subsidiary aforesaid as also those of any stores established, maintained or in which lessee may become interested within said proscribed distance, shall be open to lessors and their agents at reasonable and convenient times and places, in the event that the lessors shall desire to inspect or check the same for the purpose of determining to their satisfaction the facts and figures upon which the percentage payments of rent are to be made as in this provided.

18. It is distinctly understood between the parties hereto that the lessors do not by this lease demise to the lessee any space under or in or upon any street or sidewalk adjacent to said demised premises, but the lessors give to the lessee, during the continuance of the term of this lease, and subject to all the covenants, provisions and conditions thereof, only such rights to the use of any space under, in or upon any adjacent street or sidewalk as the lessors themselves may have; and therefore it is further expressly agreed on the part of the lessee that if any rent or compensation shall be required by the said City and County of San Francisco, of any occupant of any such space, or any penalty exacted, or damages demanded thereof, then the lessee, and not the lessors, shall be liable for the same, and shall protect and indemnify the lessors from and against any claim,

demand or liability on account thereof for the time during [19] which said demised premises shall have been occupied by the lessee. And the said lessee further convenants and agrees to and with the said lessors that it will save the said lessors harmless from any and all claims by the said City and County of San Francisco or any other public authority, for compensation or damages by reason of the use or occupancy of, or intrusion upon any sidewalk or street or part thereof, adjoining said demises premises, by the said lessee, or anyone occupying said demised premises under the said lessee, or in connection with any building now or hereafter situate upon said demised premises during the time of the occupation of the demised premises by the lessee or those holding under it.

19. The lessee covenants and agrees that it will not, directly or indirectly, before or during the term of this lease promote, establish, maintain or be interested in or aid in the promotion, establishment or maintenance of any store or stores of any character located within a distance of seven hundred fifty (750) feet in any direction from the demised premises, unless lessee pays in like gold coin to lessor within thirty (30) days succeeding the close of each calendar year of the term hereof, and on account of the rental of the herein demised premises for the year immediately passed, eight per cent (8%) of the gross volume of business actually transacted in any of the said stores in said prescribed distance, less the amount of the actual rent of said store or stores; it

being specially understood and agreed that said eight per cent (8%) aforesaid shall be considered as rent for the use and occupancy of the herein demised premises and in addition to the other rent herein reserved.

Lessee further covenants and agrees that during all of the leased term hereby created, save and except any time during which its business is interfered with by strike, lockout, fire, earthquake or other act of God or calamity beyond its control, it will in every way conduct and maintain its business and its store in [20] the herein demised premises upon a plan and terms and in a manner as favorable as the plan, terms and manner upon which any other of its stores in San Francisco shall be conducted so that its store in these demised premises shall be insured at all times the full gross volume of business to which it may be entitled by reason of its location; provided anything in this paragraph to the contrary notwithstanding, the lessee shall not be obliged to conduct any branch or department of its business at its location in the corner space of the demised premises reserved to itself, which in its opinion shall be deemed unprofitable or impracticable for any reason, it being the intent of the parties hereto that the provisions of this paragraph shall apply only to such branches or departments of its business which it may elect actually to carry on and maintain in its said store.

20. It is agreed that the occupant, or occupants, of the demised premises may display thereon such

signs as lessee or occupant may deem advisable, including the privilege, if lessee or occupant so elects, to extend its signs up to the level of the lower floor of the second floor of said building.

21. This lease is made subject to the terms and provisions of that certain lease for the property in which the demised premises are situate, made and entered in to the 31st day of December, 1931, between John Tonningsen and Pauline E. Tonningsen, his wife, both of the City and County of San Francisco, State of California, parties of the first part, lessors, and O'Brien-Kiernan Investment Co., a corporation, and Wm. H. Woodfield, Jr., in equal undivided interests but not in partnership, lessees.

The lessors hereby jointly and severally represent and warrant that they are now the sole and unqualified owners of and hold good legal title to the entire leasehold interest covered by the terms of the aforesaid Indenture of Lease dated December 31, 1931, [21] and lessors warrant unto the lessee quiet and peaceful enjoyment of the premises covered by this Indenture of Lease. The lessors further agree to comply with and perform all of the covenants and conditions in said Indenture of Lease dated December 31, 1931, contained, and lessors agree upon default therefore that the lessee may pay the rents called for by said Indenture of Lease dated December 31, 1923, and may do any and all other things in order to protect its rights to the possession and enjoyment of the premises covered by said Indenture of Lease dated December 31, 1923.

22. The covenants and conditions herein contained shall, subject to the provisions as to assignment, apply to and bind the heirs, executors, administrators, successors and assigns of the parties hereof.

23. The word lessor wherein used in this lease shall include the plural, and shall be deemed to be equivalent of the word lessors.

IN WITNESS WHEREOF the parties hereof have hereunto and to a duplicate hereof, set their respective corporate and individual names, hands and seals, the day and year first above written.

O'BRIEN-KIERNAN INVESTMENT CO.
By R. J. O'BRIEN

President

By THOMAS KIERNAN

Secretary

WILLIAM H. WOODFIELD, JR.
SAMUEL WEINSTEIN

LESSORS

LOUIS K. LIGGETT COMPANY
By W. C. WATT

Vice President

By Y. CAELI

Secretary
LESSEE [22]

I, THOMAS KIERNAN, Secretary of O'BRIEN-KIERNAN INVESTMENT CO., a California corporation, do hereby certify that the following is a

true and correct copy of a resolution adopted at a regular meeting of the Board of Directors of O'BRIEN-KIERNAN INVESTMENT CO., duly called and held at the office of the company, room 605 Alexander Building, 155 Montgomery Street, San Francisco, on Thursday, March 17, 1926, at 2 P.M., at which meeting a quorum of the Directors were present and voting:

VOTED—That, R. J. O'BRIEN, President of O'BRIEN-KIERNAN INVESTMENT CO., be and he is hereby authorized, empowered and directed to execute and enter into the name and on behalf of this Company and under its corporate seal, a lease with LOUIS K. LIGGETT COMPANY, as lessee, for the corner store and basement premises situate on the northwest corner of Mission and Twenty-second Streets, in the City of San Francisco, forty-one (41) feet on Mission Street by one hundred (100) feet on Twenty-second Street, at such rental and for such terms and upon such covenants and conditions as to said R. J. O'BRIEN are deemed for the best interests of this company, and the act and *deemed* of said R. J. O'BRIEN in executing and delivering the aforesaid lease be and the same is hereby in all things, approved, ratified and confirmed as the act and deed of this company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said O'BRIEN-KIERNAN INVESTMENT CO. this 18th day of March, 1926.

THOMAS KIERNAN

Secretary O'BRIEN-KIERNAN INVESTMENT CO. [23]

I, C. C. MASON, Assistant Secretary of LOUIS K. LIGGETT COMPANY, a Massachusetts corporation, do hereby certify that the following is a true and correct copy of a vote adopted at a regular meeting of the Board of Directors of the LOUIS K. LIGGETT COMPANY, duly called and held at the office of the Company, Liggett Building, 41 East Forty-second Street, New York City, New York, on Monday, March 1st, 1926, at 2:30 o'clock P.M., at which meeting a quorum was present and voting:

"VOTED: That W. C. Watt, Vice-President, be and he hereby is authorized, empowered and directed to execute and enter into, in the name and on behalf of this Company, and under its corporate seal, a lease with O'Brien-Kiernan Investment Company, William H. Woodfield, Jr., and Samuel Weinstein, for premises situate on the Northwest corner of Mission and Twenty-second Streets, in the City of San Francisco, California, for such term, at such rental, and upon such covenants and conditions as said W. C. Watt shall, in his discretion, deem for the best interest of this Company; and that the act and deed of said W. C. Watt in executing and delivering the aforesaid lease be and the same is hereby in all things approved, ratified and confirmed as the act and deed of this company."

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said LOUIS K. LIGGETT COMPANY, this 12th day of March, 1926.

C. C. MASON
Assistant-Secretary. [24]

We, E. LYLIA WOODFIELD (wife of WILLIAM H. WOODFIELD, JR.) and ELLEN WEINSTEIN (wife of SAMUEL WEINSTEIN) and each of us hereby consent to the making, execution and delivery of the above and foregoing lease from O'BRIEN-KIERNAN CO. (a corporation), WILLIAM H. WOODFIELD, JR., and SAMUEL WEINSTEIN to LOUIS K. LIGGETT COMPANY (a corporation) hereby ratifying, confirming and approving all of the terms, covenants, provisions and conditions thereof.

LYLIA WOODFIELD
ELLEN WEINSTEIN [25]

In consideration of the foregoing lease and One ($1.00) Dollar to the undersigned in hand paid by the lessors therein named, receipt of which is hereby acknowledged, United Drug Co. a corporation, does hereby covenant, promise and agree to and with said O'Brien-Kiernan Investment Company, William H. Woodfield Jr. and Samuel Weinstein, that the said Louis K. Liggett Company, lessee, shall well and truly pay all rents and perform and execute all the covenants and agreements therein contained on its part, and on its failure to do so in any particular the undersigned will forthwith pay unto said lessors without any previous demand, all rents accrued and all damages incurred by reason of said failure, including reasonable attorney's fees.

IN WITNESS WHEREOF, the undersigned cor-

poration has caused its corporate name and seal to be hereunto affixed this 27th day of February, 1926, by its officers thereunto duly authorized.

UNITED DRUG CO.
By CHARLES McCALLUM
By.....[26]

I, A. W. Murray, Secretary of United Drug Company, do hereby certify that the following is a true copy of a vote passed at the Annual Meeting of the Board of Directors of that Company, duly called and held at the office of the Company. 43 Leon Street, Boston, Massachusetts, on Tuesday, March 9, 1926, at which meeting a quorum was present and voting:

GUARANTEE OF LEASE BETWEEN LOUIS K. LIGGETT COMPANY AND O'BRIEN - KIERNAN INVESTMENT COMPANY ET AL.

"Upon motion, duly made and seconded, it was unanimously VOTED: That the action of Charles McCallum, Vice-President of United Drug Company, in executing and delivering as of February 27, 1926, the guarantee by and in the name of United Drug Company of all the covenants and agreements on the part of the Louis K. Liggett Company in its lease with O'Brien-Kiernan Investment Company, William H. Woodfield, Jr. and Samuel Weinstein, covering the corner store and basement premises in a building situate on the northwest corner of Mission and 22nd Streets in the City of San

Francisco, California, be and the same is hereby approved, ratified and confirmed."

IN WITNESS WHEREOF I have hereunto set my hand and affixed the corporate seal of the United Drug Company this 10th day of March, 1926.

A. W. MURRAY
Secretary

[Endorsed]: Filed MAR 1 1934 [27]

[Title of Court and Cause.]

DEMURRER

Comes now the defendant, United Drug Company, a Delaware corporation, and demurring to plaintiff's complaint on file herein, for grounds of demurrer, specifies the following:

I.

That plaintiff's complaint does not state facts sufficient to constitute a cause of action.

II.

That plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

III.

That plaintiff's complaint is uncertain in that it does not appear therein, nor can it be ascertained therefrom:

(a) Whether or not it is claimed that the lease, a copy of which is attached to the complaint and market "Exhibit A", was in full force and effect during any portion of the period beginning March 1, 1933 and ending October 31, 1933, the period during which rentals are claimed to be due from this defendant upon its assumption of the Massachusetts corporation's guaranty thereof; [28]

(b) How or in what manner or by virtue of what facts rentals for the period beginning April 1, 1933 and ending October 31, 1933 are claimed to be due from this defendant; and

(c) How or in what manner or by virtue of what facts an attorney's fee is claimed to be due from this defendant in this action.

IV.

That plaintiff's complaint is ambiguous for the reasons that it is uncertain as hereinabove set forth.

V.

That plaintiff's complaint is unintelligible for the same reasons that it is uncertain as hereinabove set forth.

WHEREFORE, having fully answered, defendant prays that it may be hence dismissed with its costs of suit herein incurred.

DATED: April 2, 1934.

CHICKERING & GREGORY

Attorneys for defendant United Drug Company, a Delaware corporation.

Due Service and receipt of a copy of the within is hereby admitted this second day of April, 1934.

OSCAR SAMUELS
YOUNG, HUDSON & RABINOWITZ
Attorney for.....

[Endorsed]: Filed Apr 2 1934 [29]

District Court of the United States
Northern District of California
Southern Division

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 28th day of November, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable Harold Louderback, District Judge.

NEW MISSION MARKET,
vs. No. 19632
UNITED DRUG CO., etc

The demurrer to the complaint, having been submitted, now being fully considered, it is Ordered that the said demurrer be and the same is hereby sustained without leave to amend the bill of complaint. [30]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19632-L

NEW MISSION MARKET,
a corporation,

Plaintiff,

vs.

UNITED DRUG COMPANY, a Massachusetts corporation, and UNITED DRUG COMPANY a Delaware corporation,

Defendants.

JUDGMENT OF DISMISSAL ON SUSTAINING DEMURRER TO COMPLAINT

The Court having sustained the demurrer of the defendant United Drug Company, a Delaware corporation, to the complaint without leave to plaintiff to amend, and having ordered that this cause be dismissed as to said defendant, and that judgment be entered herein accordingly:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action as against said United Drug Company, a Delaware corporation, and that said defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at $5.00.

Judgment entered this 8th day of December, 1934.

WALTER B. MALING,
Clerk. [31]

[Title of Court and Cause.]

PETITION OF PLAINTIFF, NEW MISSION MARKET, A CORPORATION FOR APPEAL FROM JUDGMENT MADE AND ENTERED DECEMBER 8, 1934, ON THE ORDER OF THE ABOVE COURT SUSTAINING THE DEMURRER OF THE DEFENDANT, UNITED DRUG COMPANY, A DELAWARE CORPORATION TO THE PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND.

TO THE HONORABLE HAROLD LOUDERBACK, JUDGE OF THE ABOVE ENTITLED COURT:-

Now comes the plaintiff, NEW MISSION MARKET, A CORPORATION, by its solicitors, Young, Hudson & Rabinowitz, and Oscar Samuels, and believing itself to be aggrieved by the judgment of this court made and entered herein on December 8, 1934, upon the order of this Court sustaining, without leave to amend, the demurrer of defendant United Drug Company, a Delaware Corporation, to the complaint of plaintiff herein, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and for the reasons specified in the Assignment of Errors which is filed herewith, it does pray that this appeal be allowed, and that a transcript of the records, proceedings and papers upon which said judgment was made, duly authenticated, may be

sent to [32] the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31st day of January, 1935.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Attorneys for the Plaintiff. [33]

Received a copy of the within Petition of Plaintiff for Appeal from judgment made and entered herein on December 8, 1934, this ..... day of January, 1935.

.....

Attorneys for Defendant, United Drug Company, a Delaware corporation.

[Endorsed]: Filed Jan 31 1935 [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS BY PLAINTIFF NEW MISSION MARKET, A CORPORATION, APPELLANT.

NOW COMES NEW MISSION MARKET, a CORPORATION, by its solicitors, YOUNG, HUDSON & RABINOWITZ, and OSCAR SAMUELS, and in connection with its Petition for Appeal from the Judgment of this Court made and entered in said cause on the 8th day of December, 1934, assigns for errors in said Judgment, and the proceedings of the Court therein and thereon, the following:-

1. That the court erred in determining and holding that the language in the lease involved in said action "In the event, however, that the lessee shall be adjudged a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and the lessor shall have the right immediately to reenter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy" constituted a conditional limitation, ipso facto terminating the lease upon the lessee being adjudicated a voluntary bankrupt, and was not a condition subsequent. [35]

2. That the court erred in determining and holding that said lease terminated automatically and without action upon the part of the lessor upon the adjudication of the lessee a voluntary bankrupt, and not determining and holding that said termination would not take effect until and unless the lessor availed itself of the right of re-entering the demised premises.

3. That the court erred in holding and determining, and construing the above-quoted clause to the effect, that the lessee could relieve its guarantor of responsibility upon the bond securing said lease by voluntarily seeking to be adjudicated a bankrupt.

4. That the court erred in holding and determining that said lease terminated, ipso facto, by reason of the clause contained therein above quoted without regard to or taking into consideration the bond

sued upon in the above-entitled action as a part of and supplementing said lease.

5. The court erred in disregarding the bond furnished by the lessee coincidently with the execution of said lease, and in resting its judgment upon and limiting the same to the afore-quoted provision of said lease.

6. The court erred in resting its judgment upon and limiting it to a construction of the afore-quoted provision of said lease without consideration of the remaining provisions of said lease.

7. The court erred in ordering and adjudging that plaintiff's complaint did not state a cause of action.

8. The court erred in ordering and adjudging that plaintiff's complaint did not state a cause of action against defendant, United Drug Company, a Delaware corporation.

9. The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation [36] to plaintiff's complaint in said cause, be sustained.

10. The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation to plaintiff's complaint in said cause, be sustained without leave to plaintiff to amend its complaint.

11. The court erred in rendering judgment in favor of defendant United Drug Company, a Delaware corporation, and against plaintiff herein.

DATED: at San Francisco, California, this 31st day of January, 1935.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Solicitors for Plaintiff and Appellant, New Mission Market, a corporation.

Received a copy of the foregoing Assignment of Errors this _____ day of January, 1935.

Attorneys for United Drug Company, a Delaware corporation.

[Endorsed]: Filed Jan 31 1935 [37]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL OF PLAINTIFF, NEW MISSION MARKET, A CORPORATION, UPON JUDGMENT RENDERED AND ENTERED HEREIN ON DECEMBER 8th, 1934, IN FAVOR OF DEFENDANT, UNITED DRUG COMPANY, A DELAWARE CORPORATION, AND AGAINST PLAINTIFF, NEW MISSION MARKET, A CORPORATION, SUSTAINING, WITHOUT LEAVE TO AMEND, THE DEMURRER OF SAID DEFENDANT UNITED DRUG COMPANY, A DELAWARE CORPORATION, TO THE COMPLAINT OF PLAINTIFF, NEW MISSION MARKET, A CORPORATION.

WHEREAS, the plaintiff, New Mission Market, a corporation, has presented its petition for appeal

from the judgment made and entered herein on December 8th, 1934, and has accompanied the same with its Assignment of Errors, and has prayed that said appeal be allowed;

NOW, THEREFORE, IT IS ORDERED that an appeal be allowed to said plaintiff, New Mission Market, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered herein on December 8th, 1934; and that said petition be granted upon the filing by the said plaintiff of a cost bond in the sum of Two Hundred and Fifty Dollars ($250.00).

Dated this 31st day of January, 1935.

HAROLD LOUDERBACK
District Judge.

[Endorsed]: Filed Jan 31 1935 [38]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Northern District of California, Southern Division:

You will please prepare for inclusion in the transcript for the record in the Circuit Court of Appeals for the Ninth Circuit on the appeal of

Plaintiff, NEW MISSION MARKET, a corporation, from the judgment of the above entitled Court made and entered in said cause on December 8th, 1934, whereby said Court sustained, without leave to amend, the demurrer of defendant, United Drug Company, a Delaware corporation, to the complaint of the plaintiff, a copy of each of the following pleadings, papers, decuments and proceedings, to-wit:

The Bill of Complaint of the plaintiff, NEW MISSION MARKET, a corporation;

The Demurrer interposed by the defendant, United Drug Company, a Delaware corporation, to the complaint of plaintiff; [39]

Order made by the above Court in said cause sustaining, without leave to amend, the demurrer of the defendant, United Drug Company, a Delaware corporation, to the complaint of plaintiff;

Judgment made and entered in said cause on or about the 8th day of December, 1934.

Petition of plaintiff, NEW MISSION MARKET, a corporation for an order allowing its appeal to the Circuit Court of Appeals, Ninth Circuit, from said judgment of December 8th, 1934;

Assignment of Errors filed herein by plaintiff, NEW MISSION MARKET, a corporation, on appeal;

Order dated January 31st, 1934, allowing the appeal of plaintiff NEW MISSION MARKET, a corporation, and fixing amount of Bond for Costs on Appeal;

Cost Bond on Appeal;
Citation on Appeal;
Praecipe for Record on Appeal;
together, in each case, with all endorsements and certificates thereto attached.

Dated: January 31st, 1935.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Solicitors for Plaintiff NEW MISSION MARKET, a corporation. [40]

Please furnish estimate of the Clerk's charges for making and preparing the foregoing copies of the record on file. Please give such estimate to the undersigned solicitors and counsel for Appellant at your earliest convenience.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Solicitors for Plaintiff, NEW MISSION MARKET, a corporation.

Received a copy of the within and foregoing Praecipe for Transcript of Record this 31st day of January, 1935.

CHICKERING & GREGORY
Solicitors for Defendant, UNITED DRUG COMPANY, a Delaware corporation.

[Endorsed]: Filed Feb. 1, 1935 [41]

[Title of Court and Cause.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, BALTIMORE

The premium charged for this bond is $10.00 Dollars per annum.

WHEREAS, the above named NEW MISSION MARKET, has prosecuted an appeal to the United States Circuit Court of Appeal for the Ninth Circuit, to reverse the judgment and decree of the District Court of the United States, in and for the Northern District of California, Second Division, in the above entitled cause.

NOW, THEREFORE, in consideration of the premises, the undersigned, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of the Plaintiff, that the said Plaintiff will prosecute its said appeal to effect and answer all costs if they fail to make good to their plea and appeal, not exceeding the sum of TWO HUNDRED FIFTY AND NO/100 ($250.00) DOLLARS, to which amount it acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the FIDELITY AND DE-

POSIT COMPANY OF MARYLAND, of not less than ten days, proceed summarily in the action or suit, in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor. [42]

Dated at San Francisco, California, this 31st day of January, A. D. 1935.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal] by GUERTIN CARROLL
Attorney-in-Fact

Attest C. A. BEVANS, Agent

(Signatures of Carroll and Bevans verified before F. R. Webb, a Notary Public Jan. 31, 1935.)

Approved this 1st day of February A. D. 1935

HAROLD LOUDERBACK
Judge, District Court

[Endorsed]: FEB 1 1935 [43]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 43

pages, numbered from 1 to 43, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of New Mission Market, vs. United Drug Company, etc. No. 19632-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $7.15 and that the said amount has been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of February A.D. 1935.

[Seal] WALTER B. MALING
Clerk.

J. P. WELSH
Deputy Clerk. [44]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To UNITED DRUG COMPANY, A DELAWARE CORPORATION:—

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit

Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein NEW MISSION MARKET, a corporation, is appellant, and you are the appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [45]

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, this 31st day of January A. D., 1935.

HAROLD LOUDERBACK
United States District Judge. [46]

Receipt of a copy of the within Citation on Appeal is hereby admitted this 31st day of January, 1935.

CHICKERING & GREGORY
Attorneys for United Drug Company, a Delaware corporation.

[Endorsed]: Filed FEB-1 1935 [47]

[Endorsed]: No. 7769. United States Circuit Court of Appeals for the Ninth Circuit. New Mission Market, a Corporation, Appellant, vs. United Drug Company, a Delaware Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 8, 1935.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW MISSION MARKET (a corporation),
Appellant,

vs.

UNITED DRUG COMPANY (a Delaware corporation),
Appellee.

BRIEF FOR APPELLANT.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

YOUNG, HUDSON & RABINOWITZ,
West Coast Life Building, San Francisco,
OSCAR SAMUELS,
Pacific National Bank Building, San Francisco,
Attorneys for Appellant.

Subject Index

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No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW MISSION MARKET (a corporation),
Appellant,

vs.

UNITED DRUG COMPANY (a Delaware corporation),
Appellee.

BRIEF FOR APPELLANT.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

I. STATEMENT OF THE CASE.

Appellant (plaintiff) is the assignee of the lessors in a certain lease which is set forth in full in the Transcript, pages 10 to 32. Defendant United Drug Company, a Massachusetts corporation, executed, coincidently with the execution of said lease, a guaranty of the obligations of the lessee in said lease, which guaranty is set forth in full in the Transcript, pages 32 and 33. Appellee (defendant United Drug Company, a Delaware corporation), subsequent to the execution of the lease and guaranty and prior to

the filing of this action, assumed and expressly agreed to perform all the obligations of defendant United Drug Company, a Massachusetts corporation, including the obligations provided for in the guaranty. (Tr. p. 7.)

Following said assumption by appellee of the obligations of said guaranty and prior to the filing of this action said lessee filed a voluntary petition in bankruptcy and was thereupon adjudicated a bankrupt. (Tr. p. 7.)

Appellee demurred to the complaint herein claiming that the adjudication in bankruptcy of the lessee constituted, under the terms of said lease, a conditional limitation *ipso facto* terminating the lease and thus relieving appellee from all liability on the guaranty assumed by it. The demurrer was sustained without leave to amend.

The sole question before the court is whether the lease and guaranty should be construed so as to constitute the adjudication in bankruptcy of the lessee a conditional limitation *ipso facto* terminating the lease, or whether the lease and guaranty should be construed so as to constitute the adjudication a condition subsequent which would terminate the lease only at the volition of the lessor.

II. SPECIFICATION OF ERRORS.

The errors relied upon by appellant are:

(1) That the court erred in determining and holding that the language in the lease involved in this

action "In the event, however, that the lessee shall be adjudged a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and the lessor shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy" constituted a conditional limitation *ipso facto* terminating the lease upon the lessee being adjudicated a voluntary bankrupt, and was not a condition subsequent.

(2) That the court erred in determining and holding that said lease terminated automatically and without action upon the part of the lessor upon the adjudication of the lessee a voluntary bankrupt, and not determining and holding that said termination would not take effect until and unless the lessor availed itself of the right of re-entering the demised premises.

(3) That the court erred in holding and determining, and construing the above-quoted clause to the effect, that the lessee could relieve its guarantor of responsibility upon the bond securing said lease by voluntarily seeking to be adjudicated a bankrupt.

(4) That the court erred in holding and determining that said lease terminated, *ipso facto,* by reason of the clause contained therein above quoted without regard to or taking into consideration the bond sued upon in the above-entitled action as a part of and supplementing said lease.

(5) The court erred in resting its judgment upon and limiting it to a construction of the afore-quoted

provision of said lease without consideration of the remaining provisions of said lease.

(6) The court erred in ordering and adjudging that plaintiff's complaint did not state a cause of action.

(7) The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation, to plaintiff's complaint in said cause, be sustained.

(8) The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation, to plaintiff's complaint in said cause, be sustained without leave to plaintiff to amend its complaint.

(9) The court erred in rendering judgment in favor of defendant United Drug Company, a Delaware corporation, and against plaintiff herein.

III. ARGUMENT.

A. INTRODUCTION.

This case closely approaches one of first impression. While it may be said that in a measurable degree the interpretation of any document is controlled by its peculiar provisions and ruling precedent is rarely or at all available, the instant case is in even a less chartered field. Not only have we a particular clause never before construed by any court, but we also have a further unprecedented situation, a coincident guaranty which must be considered and weighed in arriving at a construction of that clause.

The material portions of the lease are as follows:

"That the lessors, in consideration of the rents, covenants and agreements hereinafter contained, to be paid, kept and performed by the lessee, and upon the *condition* that each and all of the said covenants and agreements shall be fully kept and performed by the lessee, does by these presents lease, demise and let unto the lessee, for the purpose of conducting herein any lawful business, those certain premises situated in the City and County of San Francisco, State of California, and more particularly described as follows, to-wit: * * *

To have and to hold the said premises, with the appurtenances, unto the lessee, *for the term of twenty (20) years,* commencing on the fifth day of June, 1927, * * *" (Tr. pp. 11, 12.)

"And the lessee does hereby hire and take of and from the lessor the said premises, for the *said term* and at the said rental, *and does hereby covenant and agree with the lessor as follows*:

1. That the lessee will pay the said rent reserved to the lessor at the office of the lessor, or at such other place or places as may be designated from time to time by the lessor, at the times and in the manner provided as aforesaid for the payment thereof, without deduction, default or delay, and that *in the event of the failure of lessee so to do, or in the event of a breach of any of the other covenants herein contained on the part of the lessee to be kept and performed, it shall be lawful for the lessors to re-enter into and upon the said premises,* and every part thereof, and to remove all persons and property therefrom, and to repossess and enjoy the said premises as in the first and former estate of the lessors,

anything to the contrary herein contained notwithstanding." (Tr. p. 15.)

"If the lessee shall be in default in the performance of any condition or covenant herein contained, and shall abandon or vacate said premises, besides other remedies or rights the lessors may have, it shall be optional with the lessor to relet the said premises for such rent and upon such terms as the lessor may see fit it being understood that lessors shall not rent or lease any part of the demised premises at a rental less than the approximate prevailing rental at the time of such rental or leasing, and if a sufficient sum shall not be thus realized after paying the expenses of such reletting and collecting to satisfy the rent hereby reserved, the lessee agrees to satisfy and pay any deficiency, and to pay the expenses of such reletting and collecting." (Tr. p. 16.)

"The lessee may assign this lease as a whole to any subsidiary or associate of the lessee in the same line of general drug business as lessee and which subsidiary or associate shall acquire a substantial part of the assets of the lessee and all the drug stores operated, owned and/or controlled by lessee in San Francisco or San Francisco and elsewhere and whose gross annual business shall amount to at least Five Million ($5,000,000.00) Dollars per year; and lessee may sublet any part of the demised premises to any other person for any lawful business, provided that the corner portion, twenty-five (25) feet on Mission Street by eighty (80) feet on Twenty-second Street to be occupied by lessee for its own business shall not be underlet except to such associate or subsidiary as aforesaid. The lessee shall at all times, even

after any assignment, be and remain directly liable to pay the rent and other payments, and perform all the other covenants and conditions herein provided, it being understood that no assignment shall be made unless the assignee shall also assume full responsibility for the payment of the rent and other payments in this lease provided, and for the performance of all the covenants and conditions hereof. In the event, however, *that the lessee shall be adjudicated a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and said lessors shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy,* and if the lessee shall become insolvent or fail in business, or if a receiver shall be appointed to take charge of the business of lessee, or receive the rents of the demised premises, or if assignment be made for the benefit of creditors, then this lease may be terminated at once at the option of the lessors expressed in writing, in which event the lessors shall have the right immediately to re-enter the demised premises, and in no event shall this lease be treated as an asset of the lessee after the exercise of said option." (Tr. pp. 18, 19.)

"Lessee further covenants and agrees *that during all of the leased term hereby created, save and except any time during which its business is interfered with by strike, lockout, fire, earthquake or other act of God or calamity beyond its control,* it will in every way conduct and maintain its business and its store in the herein demised premises upon a plan and terms and in a manner as favorable as the plan, terms and man-

ner upon which any other of its stores in San Francisco shall be conducted so that its store in these demised premises shall be insured at all times the full gross volume of business to which it may be entitled by reason of its location;" (Tr. p. 27.)

The guaranty in question reads as follows:

"In consideration of the foregoing lease and One ($1.00) Dollar to the undersigned in hand paid by the lessors therein named, receipt of which is hereby acknowledged, United Drug Co., a corporation, does hereby covenant, promise and agree to and with said O'Brien-Kiernan Investment Company, William H. Woodfield Jr. and Samuel Weinstein, that the said Louis K. Liggett Company, lessee, shall well and truly pay all rents and perform and execute all the covenants and agreements therein contained on its part, and on its failure to do so in any particular the undersigned will forthwith pay unto said lessors without any previous demand, all rents accrued and all damages incurred by reason of said failure, including reasonable attorney's fees." (Tr. p. 32.)

Appellee's contention, based upon the wording of the particular clause, standing alone, dealing with bankruptcy, is that the adjudication of bankruptcy of the lessee *ipso facto* terminates the lease, while appellant contends that the proper construction of this clause, considering the lease as a whole, especially in light of the guaranty, is that the bankruptcy does not terminate the lease unless the lessor so elects.

B. THE GENERAL PRINCIPLES RELATING TO THE INTERPRETATION OF INSTRUMENTS SUPPORT APPELLANT'S POSITION.

At the outset it is well to consider certain well settled rules governing the interpretation of written instruments.

> "The scope, purpose, and effect of the lease must be determined from a consideration of it as a whole, rather than by a resort to any individual clause thereof."
>
> *Lang v. Pacific Brewery Co.* (1919), 44 Cal. App. 618.

> "The lease must be given such an interpretation as will make it effective in conformity with the intention of the parties."
>
> *Lang v. Pacific Brewery Co.* (supra).

> "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."
>
> *Code of Civil Procedure,* Section 1864.

> "Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other."
>
> 13 *Corpus Juris* on Contracts, page 528, Section 487.

Of course the interpretation of specific clauses referring to the termination of agreements are subject

to the same rules. Thus it is stated in the Note in 13 *Corpus Juris,* pages 599-600:

> "The real intent and agreement of the parties on the matter of duration, as the same is made to appear by the contract, is to be enforced just the same as the other provisions thereof, so that on this point, as upon all others, we look to the contract in all its parts and entirety, as the evidence of the intent of the parties. It is a fundamental and well-recognized rule that in construing contracts, courts may look not only to the specific language employed, but also to the subject-matter contracted about, the relation of the parties thereto, the circumstances surrounding the transaction, or in other words, may place themselves in the same position that the parties occupied when the contract was entered into, and view the terms of the agreement in the same light in which the parties did when the same were formulated and accepted. Robson v. Mississippi Logging Co., 43 Fed. 364, 369."

The fundamental principle underlying all rules relating to the construction of leases and other instruments is that they be given an interpretation in conformity with the intention of the parties in light of all the circumstances.

There can be no doubt in the instant case that the parties did not intend to create a conditional limitation. From the lessor's point of view no advantage could be gained by having the lease automatically terminate rather than at the lessor's option. There is likewise no advantage from the lessee's point of view. If the lease were a valuable asset, and it must be presumed that the lessee believed it to be at the

time of its execution, certainly the lessee would not desire that it terminate automatically. On the other hand, if the lease should be a liability at the time of the bankruptcy of the lessee, the trustee in bankruptcy of the lessee could always disaffirm it at his option. Since no substantial benefit could accrue either to the lessor or to the lessee by inserting a clause in the lease which would cause the lease to terminate *ipso facto* upon the adjudication in bankruptcy of the lessee, it must be presumed that the parties did not intend a conditional limitation.

C. COURTS HOLD THAT A MERE ELECTION TO TERMINATE A LEASE EXISTS, NOTWITHSTANDING THAT ONE PARTICULAR CLAUSE, ISOLATED FROM THE REST OF THE LEASE, SPECIFICALLY PROVIDES FOR AN AUTOMATIC TERMINATION.

The generally accepted statement of the rule governing the interpretation of clauses terminating a lease upon the default of the lessee is as follows:

> "Leases which contain a forfeiture of the lessee's estate for nonpayment of rent, or breach of other condition, declare that on the happening of this contingency the demise shall thereupon become null and void, [*mean*] *that the forfeiture may be enforced by re-entry, at the option of the lessor.*" (Italics added.)
>
> *Ewell v. Daggs* (1883), 108 U. S. 143, 27 L. Ed. 682.

In 2 *Tiffany*—Landlord and Tenant, at page 1368 it is stated:

"It was at one time the law in England that, in case of a lease for years, a provision that the lease should become 'void' upon a default by the tenant in the performance of any particular stipulation, had the effect of terminating the tenancy immediately, without any action by the landlord, the courts thus in effect regarding such a provision not as a condition, but as a special limitation. This view has now, however, been repudiated in that country, it being recognized that the effect thereof was to enable the tenant, desiring to terminate the lease, to do so by merely making a default, he thus taking advantage of his own wrong. The rule now recognized there, and in most parts of this country, is that, even though the instrument of lease provides that the lease shall become void or terminate upon the breach of a stipulation by the lessee, such a breach does not terminate the tenancy until the landlord has in some way signified his election that it shall do so. *And such election by the landlord is a fortiori necessary in the case of a lease which provides for a right of re-entry* or a forfeiture on breach of a condition. The same principle has been applied in the case of a provision that on default by the lessee he should surrender possession. The effect of these various decisions seems to be that, whatever the language used, whether that adapted to the creation of a special limitation or a condition subsequent, it will, if the contingency referred to is in default by the tenant, be construed as creating an estate on condition subsequent, and not one on special limitation. In two or three states, however, the former English rule appears to be still adhered to, the provision that the lease shall be void or shall terminate operating according to its literal meaning." (Italics added.)

This rule has been applied even though an express option to terminate the lease is given to the lessor in other contingencies.

68 Bacon Street, Inc. v. Sohier (Mass. 1935), 194 N. E. 303. The lease there under consideration provided:

> "That the within lease shall cease, determine and become null and void upon the happening of either or all of the following contingenies: (a) In case at any time during the term of this lease the Lessee shall attempt to sell, pledge or dispose of said shares of capital stock or any part thereof or this lease * * * (b) In case at any time hereafter the Lessor shall determine * * * to sell the property of the Lessor in which the apartments hereby leased shall be, then and in such event this lease and all right and estate of the Lessee thereunder shall *at the option of the Lessor* terminate after the receipt of thirty * * * days' notice of the Lessor's determination aforesaid to sell * * *, and upon or prior to the expiration of thirty * * * days after receipt of such notice the Lessee shall quit and surrender up possession of said premises and this lease shall thereupon cease and determine."

In holding that the lease did not automatically terminate upon a transfer by the lessee under Subdivision (a) thereof the court said (page 305):

> "The defendant contends that the lease was terminated as a result of his assignment to Burr by virtue of the ninth clause in the lease which provides that the lease 'shall cease, determine and become null and void,' upon the happening of either of two contingencies, one of which is the attempt by the lessee to sell, pledge, or dispose of the lease, or his shares of stock. It is plain that this

proviso, following as it does the grant of a definite term, is not a conditional limitation. Similar provisions in leases are not uncommon especially when coupled with a right of re-entry. They have uniformly been construed as having been placed in the lease for the benefit of the lessor. It is wholly at his election whether he shall avail himself of the breach as a cause of forfeiture or not. Bartlett v. Greenleaf, 11 Gray. 98; Saxeney v. Panis, 239 Mass. 207, 210, 131 N. E. 331. It follows that the defendant did not terminate the lease by his violation of the condition contained in the ninth clause."

The same doctrine is followed in California.

Central Oil Co. v. Southern Refining Co. (1908), 154 Cal. 165. Plaintiff agreed to deliver oil to the defendant and the contract provided (p. 166):

"* * * This contract shall commence with the 1st day of July, 1904, and continue monthly thereafter for the period of one year and the violation of any of the terms or conditions thereof by either party hereto shall work a forfeiture thereof, and this agreement shall thereupon become void and of no effect."

The court said (pp. 166, 167):

"Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect'; that this provision means that the violation terminated the contract and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that by a violation of the terms of the contract the rights of the

party violating it cease, and as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for 'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all.' (9 Cyc. of L. & P., p. 618.) Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party. (Civ. Code, sec. 1511, 1512, 1514.) Such has uniformly been the construction put upon language such as this when found in contracts. (Wilcoxson v. Stitt, 65 Cal. 596 (52 Am. Rep. 310, 4 Pac. 629); Mancius v. Sergeant, 5 Cow. 271, note; Dana v. St. Paul Investment Co., 42 Minn. 196, (44 N. W. 55); Westervelt v. Huiskamp, 101 Iowa 202, (70 N. W. 125); Raymond v. Caton, 24 Ill. 123.)"

In *Wilcoxson v. Stitt* (1884), 65 Cal. 596, a similar situation was presented, and after the citation of many cases the court said (p. 600):

"In the light of these cases, and we find none to the contrary, we feel constrained to hold that the meaning of the clause under discussion in the agreement in this case is that such agreement is void only at the election of the plaintiff, who can avoid it or enforce it at his option."

The rule above set forth likewise governs the obligation of a guarantor.

In 16 *Ruling Case Law,* page 1118, the rule is stated as follows:

> "It is the general rule that provisions in leases for their forfeiture upon the breach of the lessee's covenants are for the benefit of the lessor, and he has the election to determine whether he will insist on the forfeiture or not. While in some early cases in England and in this country, a provision that the lease should become void or words of similar import, upon the nonperformance by the lessee of his agreements contained therein, were considered in the nature of conditional limitations terminating the lease ipso facto upon the happening of such contingency, it was soon realized that such a construction permitted the lessee to take advantage of his own wrong and thus escape liability on a burdensome lease, and it is now the established rule that such a provision is in the nature of a condition subsequent and entitled the lessor at his election to declare the lease forfeited or not * * * *So, though it is well settled that the liability of sureties is one strictissimi juris, it is held that a provision in a lease that it shall become void upon the lessee's nonpayment of rent when due does not affect the continued liability of a surety for the tenant if the lessor elects not to enforce a forfeiture.*" (Citing *Clark v. Jones,* 1 Denio (N. Y.) 516, 43 Am. Dec. 706.) (Italics added.)

D. BANKRUPTCY OF A LESSEE AND ESPECIALLY VOLUNTARY BANKRUPTCY IS A DEFAULT.

There is an obligation on the part of the lessee in every lease, either express or implied, not to default and becoming a voluntary bankrupt is necessarily a default on the part of the lessee.

> *Schneider v. Springman* (6th Circuit—1928), 25 Fed. (2d) 255:
>
> "* * * a condition will not unnecessarily be interpreted so as to permit one of the parties, by his own default, to bring about his release. Whatever might be thought of involuntary bankruptcy or liquidation, *it is clear that a voluntary bankruptcy would satisfy this condition and that such bankruptcy would be at the wish of the lessee. It cannot be assumed that the lessor would have acquiesced in the acquiring by the lessee of a right by which the lessee could, at his own election, defeat all further obligations.*" (Italics added.)

This is necessarily true since a person (or corporation) may file a petition in voluntary bankruptcy at any time he desires, and, regardless of his financial condition or his motive, may be adjudicated a bankrupt.

> *In re People's Warehouse Co.*, 273 Fed. 611:
>
> "Undoubtedly any person owing debts has the right to seek the bankruptcy court for the purpose of winding up his affairs, and his motive in doing so is immaterial. It also may be considered settled that on a voluntary petition an adjudication may be made as to a perfectly solvent person."

It is recognized by the courts that a person may capriciously file a voluntary petition in bankruptcy.

In the case of *In re Vadner,* 259 Fed. 614, one of the grounds for removal from the State to the Federal Court was that the defendant was adjudged a bankrupt. The court said (pp. 633, 634):

> "Defendants place their main reliance on the fact that Vadner had been adjudged a bankrupt in this court. If this circumstance is sufficient to require the divorce case, the law case, and the equity suit to be removed to the federal court for Nevada, and each issue notwithstanding the judgment, to be tried de novo, it is apparent that the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) affords a method of bringing into the federal tribunals civil suits without limit. Any person, except a municipal, railroad, insurance, or banking corporation, is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. If such a person owes debts, however small, he may file a petition. It is not necessary for him to allege or prove insolvency; and, furthermore, his petition cannot be opposed by his creditors. Can such a person, finding himself involved in litigation, in which the decision has been, or is likely to be, adverse, by filing a voluntary petition in bankruptcy, cause the suits against him to be removed to a federal court and there tried anew? If under such circumstances the present litigation is removable from the Utah state court to the United States District Court for Nevada, what is to prevent a person who is sued in a superior court of California from residing for the greater part of the next six months in Maine, and then and there filing a petition in voluntary bankruptcy, and thus conferring on the United States District Court for Maine exclusive jurisdiction over the controversy pending in the California state court? The possible uses which might

thus be made of the Bankruptcy Act are startling to contemplate."

The rule that bankruptcy is a default is especially applicable to the instant case in view of the following portions of the lease:

> "Lessee further covenants and agrees *that during all of the leased term hereby created, save and except any time during which its business is interfered with by strike, lockout, fire, earthquake or other act of God or calamity beyond its control,* it will in every way conduct and maintain its business and its store in the herein demised premises upon a plan and terms and in a manner as favorable as the plan, terms and manner upon which any other of its stores in San Francisco shall be conducted so that its store in these demised premises shall be insured at all times the full gross volume of business to which it may be entitled by reason of its location." (Tr. p. 27.)

It is indeed difficult to comprehend how the lessee can agree to conduct its store on the premises not only during the leased term, but "during *all* of the leased term" and yet not be in default if it voluntarily files a petition in bankruptcy. Especially is this so, since the only exceptions to the covenant are circumstances *beyond the lessee's control.*

It is to be noted that in the guaranty it is provided that the guarantor "does hereby covenant, promise and agree * * * [that the lessee] shall well and truly * * * execute all the covenants and agreements [in the lease] contained on its part."

The construction of the clause in the manner sought by appellee would permit the lessee to termi-

nate the lease at any time by its own wilful default. As was said in *Central Oil Co. v. Southern Refining Co.*, supra,

> "* * * It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for 'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all.' (9 Cyc. of L. & P., p. 618.)"

Therefore, under this well established doctrine, the bankruptcy of the lessee in the instant case cannot automatically cancel the lessee's obligations.

E. VIEWING THE LEASE AS A WHOLE, IT IS APPARENT THAT THE PARTIES INTENDED A CONDITION SUBSEQUENT.

Since it is fundamental that the proper construction of an instrument must be determined from a consideration of it as a whole, rather than by resort to any particular clause, it becomes important to briefly analyze the lease in question.

The first clause in the lease *expressly* states that the lease is executed by the lessor upon *condition* that each and all of the covenants and agreements of the lessee shall be fully kept and performed, for a fixed term of twenty years. (Tr. pp. 11, 12.) In the event of a breach "it shall be lawful for the lessors to reenter". (Tr. p. 15.) Furthermore, in the event of

a default by the lessee and the lessee abandons or vacates the demised premises, "it shall be optional with the lessor to re-let the said premises" and the lessee agrees to satisfy any deficiency. (Tr. p. 16.) "Lessee further covenants and agrees that during *all* of the leased term created" it will maintain its business on the demised premises. (Tr. p. 27.) From these provisions and from the general tenor of the entire lease it is clear that the parties contemplated that the lease should continue for a definite term of twenty years, unless the lessor elected to terminate it for a default on the part of the lessee.

In accordance with the case of *Schneider v. Springman,* supra, the fact that voluntary bankruptcy of the lessee is an implied default brings bankruptcy within the purview of the general clause dealing with all defaults and specifically conferring upon the lessor an option to terminate. This being true, it is a logical corollary that the general clause is not to be disregarded where the specific clause is cast in the form given to it.

Yet solely relying upon particular language of the specific clause relating to bankruptcy in disregard of the rationale of the instrument, appellee seeks to override the palpable intention of the parties as disclosed by the entire lease, in direct violation of all well settled principles of construction.

F. THE COINCIDENTLY EXECUTED GUARANTY IRREFUTABLY CONDEMNS THE CONSTRUCTION SOUGHT BY APPELLEE.

The existence of the guaranty is of prime importance in determining the question before the court and is convincing almost to the degree of demonstration. The guaranty and lease were part of one transaction and both are to be considered in determining the proper construction of the lease. (Refer to rules of construction set forth supra.) The very purpose of the guaranty was to protect the lessors in the event that the lessee failed to perform the obligations of the lease. Then, and only then, would the guaranty be of any value, and yet the construction placed on it by the appellee would rob the appellant of the benefits of that protection from the moment it became available. In other words, the guaranty would die coincidently with the birth of the circumstance which would permit of recourse to it. The obvious object of lessors in requiring a guaranty was to protect themselves in the event of bankruptcy of the lessee or other circumstances affecting its financial responsibility, and yet opposing counsel would have that very event (in this case, voluntary bankruptcy) against which the guaranty afforded protection destroy that very protection. The principal of the guarantor could by its voluntary act confer upon the latter immunity from liability and deprive the obligee of any security whatever. A construction of the provision of the lease which would accomplish such a purpose demonstrates by its very statement that it is violative of the intention of the parties. A court will be loath to indulge in a conclusion carrying with it such an unusual and inequitable result without being forced into

the position by circumstances beyond its control. The language in the lease in question does not exact such an interpretation, but, to the contrary, the lease and guaranty jointly justify, if not require, the construction that the provision in question is a condition subsequent, operative only after exercise by the lessors of the option conferred upon them.

The only just and logical construction that can be placed upon the lease, particularly in light of the guaranty, is that the lessors had the right to terminate the lease and re-enter the premises, but that they were not required to exercise that right. Since they did not do so, the lease was at all times mentioned in the complaint in full force and effect and therefore the appellee is liable on its assumption of the guaranty.

G. THE SPECIFIC AUTHORITIES DEALING WITH THE BANKRUPTCY OF THE LESSEE DEFINITELY SUPPORT APPELLANT'S POSITION.

While, as we have stated, there is no case involving a lease so similar to that before this court that it can be cited as determinative of the issues here under consideration, there are some authorities which are of assistance. The case most nearly in point is *Schneider v. Springman* (6th Cir., 1928), 25 Fed. (2d) 255. The lease there under examination provided:

> "Should the lessee become bankrupt or go into involuntary liquidation, then, in such event, this lease shall become immediately forfeited, and all payments made thereon shall be forfeited to the lessor."

"(10) This lease, at the option of the lessor, shall be void in case of any violation of any agreement or covenant herein contained."

In deciding that the quoted provisions constituted a condition subsequent, the court reasoned as follows:

"(1, 2) Two considerations lead us to agree with the District Judge. One is that ordinarily the party for whose benefit a condition is provided has an election whether or not to insist upon the condition; and this principle applies to leases as well as to other contracts. 'Leases which * * * declare that on the happening of the contingency the demise shall thereupon become null and void [mean] that the forfeiture may be enforced * * * at the option of the lessor.' Ewell v. Daggs, 108 U. S. 143, 149, 2 S. Ct. 408, 412 (27 L. Ed. 682.) See, also, Taylor's Landlord and Tenant (8th Ed.) §492. We must look upon this condition as being dominantly for the benefit of the landlord. She had normally a complete legal right to the rent for the full term, and would not naturally yield it up; in the ordinary case of bankruptcy, it may or may not be in the interest of the lessor to have a forfeiture, and the right to elect would not naturally be given up. Nor was it seemingly for the benefit of the lessee to have the lease terminated. Often, an existing lease is an asset most valuable to the lessee, and he would not naturally intend in advance to deprive himself of that asset. Another aspect of the same reason is found in the correlative rule that a condition will not unnecessarily be interpreted so as to permit one of the parties, by his own default, to bring about his release. Whatever might be thought of involuntary bankruptcy or liquidation, it is clear that a voluntary bank-

ruptcy would satisfy this condition and that such bankruptcy would be at the wish of the lessee. It cannot be assumed that the lessor would have acquiesced in the acquiring by the lessee of a right by which the lessee could, at his own election defeat all further obligations.

It is true that, if the rule is the same in Kentucky as in Ohio, and if therefore a claim for further rent is not provable in bankruptcy nor dischargeable therein (Wells v. Twenty-first St. [C. C. A. 6] 12 F. [2d] 237), the lessee might look forward to a benefit by providing that the lease should be by bankruptcy absolutely ended; but such possibility is not strong enough to be impressive as an aid to determining the intent of the parties.

* * * * * * *

(4) The further clause (10), which expressly provides that the lease shall be void at the option of the lessor in certain events, shows, it is true, that the parties knew how specifically to make the option of the lessor the controlling element when they wished to; but this consideration alone is not persuasive that they did not intend the lessor to have another option, otherwise appropriate, merely because the option clause was not also there contained. Indeed, since there is at least an implied agreement contained in the lease not to become bankrupt, the express option of clause 10 might well be extended to the contingency of bankruptcy."

The court stated that an additional reason for its decision was that the word "forfeited" was used rather than "terminated" but this reason was not essential to the court's ultimate decision. It was simply added to the reasons already held sufficient.

In the case of *Re Roth & Appel* (C. C. A., 1910), 181 Fed. 667, the lease contained the following provision:

> "In case the lessee is declared bankrupt, the lease shall terminate, and the lessor has a right to re-enter * * *"

The court said:

> "Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt, and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry, and not by the bankruptcy. Re Ells (D. C.) 98 Fed. 967. But the lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties."

These cases fully support appellant's contentions, and it must at all times be remembered that appellant's position is strongly fortified by the guaranty heretofore referred to. If the court will not treat bankruptcy as a conditional limitation under the wording of the leases in the cited cases, certainly it cannot be a limitation in the instant case when consideration is given to the required guaranty.

Appellee relies upon the case of *Jandrew v. Bouche* (1928), 29 Fed. (2d) 346. In that case the lease provided:

> "This lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of said lessees."

The court at the outset pointed out that if the lease were not terminated under the law of Texas, where

the case arose, the lessor would have a rental lien for the twelve month period immediately subsequent to the bankruptcy, which lien would absorb the entire assets of the bankrupt's estate. The very statement of this fact by the court necessarily means that the court considered it to be material and that other creditors would suffer by holding this clause to be other than a conditional limitation. It must be considered that the court was therefore inclined to hold that the clause in question created a conditional limitation, if it were possible to do so.

It will be conceded, of course, that the language in the *Jandrew* case differs radically from the language in the lease presented to this court, and it is indisputable that the language in that case is stronger than in the instant case. Necessarily the clause in the Jandrew lease that "the lease shall be personal to the lessees" was one of the pivotal factors controlling the court's determination. Similar language, or language of like import, is absent from the lease here under consideration. Furthermore, the clause conferring a right to re-enter in a certain event can only signify that a privilege, which otherwise would not exist, has been extended to the lessor to be exercised if it so desires. (See *Re Roth & Appel,* supra.) This clause was not embraced within the provisions of the lease before the court in the *Jandrew* case and its absence is of major moment in distinguishing the two cases.

The court in the *Jandrew* case stated:

> "The question presented is solely as to the construction of the lease. It is not free from

> doubt and we are not advised of any controlling decision in point."

That this language weakens the opinion is self evident. When we are aware of the fact that the two contrary decisions of the United States Circuit Court of Appeals, cited above, were in existence when that opinion was written, grave doubt must necessarily arise as to whether or not the court's decision would have been the same had those two cases been presented to it. Furthermore, the difference between the situation there presented and in the instant case is so pronounced as to practically nullify any force which the case might otherwise have. Here there is submitted for the construction of the court a lease and a concurrently executed guaranty. In the *Jandrew* case the court had before it only a lease. The vital effect of the guaranty has heretofore been explained.

It is well to note that while the *Jandrew* case was decided a few months later than the case of *Schneider v. Springman,* supra, it can be given no greater weight merely because of the time element, for, as already shown, the *Schneider* case was not before the court which decided the *Jandrew* case. Rather should the *Schneider* case be controlling, for there the court gave serious consideration to the question involved and set forth its reasons in full, while in the *Jandrew* case merely the conclusion of the court was given and the court admitted that the question was "not free from doubt".

Of course, in a case in which the court is faced with a question solely of construction, as in the instant case, no one decision can be conclusive merely

because of the final result reached by the court, unless the circumstances are similar, for necessarily differentiating circumstances call for different conclusions. The *Jandrew* case and the one here involved are so variant in facts and circumstances that any argument which places its main reliance upon a supposed analogy between them defeats itself.

H. ANALYSIS OF THE PRINCIPAL CONTENTIONS OF APPELLEE RAISED IN THE COURT BELOW.

Appellee necessarily relies upon the case of *Jandrew v. Bouche,* supra, which, as heretofore shown, is wholly insufficient to support its contention that the voluntary bankruptcy of the lessee in the instant case is a conditional limitation.

Appellee's principal argument is that the clause dealing with bankruptcy appears on its face to be a conditional limitation, especially in light of the option granted to the lessor in reference to other situations. We have already seen that even though the language of a particular clause in a lease reads as though the default of the lessee constitutes a conditional limitation, the courts will construe the lease so that it will not terminate except at the instance of the lessor. We have shown further that bankruptcy, especially voluntary bankruptcy, is a default of the lessee. Thus, even assuming that the clause is so worded as to be a conditional limitation, that in itself is not sufficient.

The fact that an option is granted in the event of other contingencies lends little support to appellee's contention. In the case of *Schneider v. Springman,*

supra, a similar situation was presented and the court said:

> "The further clause (10), which expressly provides that the lease shall be void at the option of the lessor in certain events, shows, it is true, that the parties knew how specifically to make the option of the lessor the controlling element when they wished to; but this consideration alone is not persuasive that they did not intend the lessor to have another option, otherwise appropriate, merely because the option clause was not also there contained."

In *68 Beacon Street, Inc. v. Sohier,* supra, the lease was so worded that it would appear to cease *ipso facto* upon an assignment by the lessee of the lease or certain corporate securities, while in the same paragraph the lessor was specifically granted an *option* to terminate the lease in another contingency. Yet the court held that upon an assignment by the lessee it was wholly at the election of the lessor whether or not the lease be terminated.

The mere fact that the lease expressly grants to the lessor an option to terminate the lease in the event of certain contingencies does not deny to the lessor a similar option in the event of the lessee's voluntary bankruptcy.

Again, it must be kept in mind that the clause in question gives to the lessor a right of re-entry. If appellee's claim that the clause should be construed as a conditional limitation were accepted, the lessor would have the right to re-enter immediately without words to that effect. If unaccepted, then the clause properly provides that the lessor could immediately

exercise the right of re-entry at its will. To ascribe any purpose whatever to the right of re-entry, the court must conclude that there is created a condition subsequent and not a conditional limitation.

Appellee emphasized the language "in no event shall the lease be treated as an asset of the lessee after adjudication of bankruptcy". To this, the response was made that the emphasized language follows and is associated with the re-entry clause and the natural interpretation of the two is that in the event the right of re-entry is exercised, "*then* in no event shall the lease be treated as an asset of the lessee after adjudication of bankruptcy".

It was argued by appellee that in construing the lease reliance should be had on and limited to the language in question, and that there should be neither insertion of a word nor disregard or deletion of a word or phrase, and the court should not construe the clause as though it were in the form above set forth with the inclusion of the word "then". This argument by appellee leaves it on the horn of the dilemma. If its position be recognized, the re-entry clause cannot be disregarded and must be given cogency, with the consequence that we then have an undeniable condition subsequent, for it can only signify that a privilege has been extended to a lessor exercisable if it sees fit. If, on the other hand, no significance is to be ascribed to the re-entry clause, we are running counter to the very principle of construction which the appellee invokes. Certainly that principle, if applicable at all, must be utilized in the instance of both parties. It cannot be available to appellee and unavailable to appellant.

In the lower court it was argued that a lease is presumably drawn by the lessor and therefore all doubts should be resolved against him. If this presumption were available to the appellee, it would be entitled to little, if any, weight in light of the overwhelming proof that the clause in question is a condition subsequent.

In the final analysis the lease in its entirety, together with the guaranty, so eloquently voices an intention of the parties contrary to that for which the appellee strives, that a proper interpretation cannot be influenced by a bare presumption of the character by appellee suggested. However, a presumption such as this cannot be utilized upon demurrer—it is a rule of evidence.

See,

Lassing v. James, 107 Cal. 348;
Irish v. Sunderhaus, 122 Cal. 308;
Herzog v. Atchison etc. R. R. Company, 153 Cal. 496;
Pettit v. Forsyth, 15 Cal. App. 149.

I. CONCLUSION.

Appellee places a technical construction upon a particular clause in the lease and, without more, seeks to maintain its position. In order to support appellee's contentions, we must, first, disregard the intention of the parties, for, as already shown, the court cannot reasonably find that the parties intended to create a conditional limitation.

Secondly, we must eliminate the right of re-entry granted in the particular sentence in question, since it necessarily gives to the lessor a privilege which may or may not be exercised.

Thirdly, we must disregard all other portions of the lease for, considered as a whole, it is clear that the parties intended that the lease should continue for its full term without the right of the lessee to cancel same.

Fourthly, we must eliminate from our consideration the guaranty, as it is inconceivable, as heretofore argued, that the lessor would have sought a guaranty if the guaranty could be voided by the wilful act of the lessee.

Fifthly, we must disregard every conceivable rule of construction and especially the long established doctrine that a default of a lessee will not *ipso facto* terminate a lease.

Sixthly, we must disregard the well considered case of *Schneider v. Springman,* supra, and rely upon the case of *Jandrew v. Bouche,* supra, which is readily distinguishable and wholly insufficient.

Seventhly, we must disregard every principle of justice and fair dealing if we are to allow a person to

wilfully violate a sacred obligation, and by such violation confer immunity upon itself and its guarantor.

Certainly no valid reason can possibly be advanced for so flagrantly violating every rule of construction, every principle of law, the clear intention of the parties, and every elementary principle of fairness.

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December 6, 1935.

Respectfully submitted,
YOUNG, HUDSON & RABINOWITZ,
OSCAR SAMUELS,
Attorneys for Appellant.